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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. –, Original

STATE OF ARKANSAS,

Complainant,

vs.

STATE OF TEXAS AND JOHN BEN SHEPPERD, ATTORNEY GENERAL OF TEXAS,

Defendants

MEMORANDUM BY THE STATE OF ARKANSAS

TOM GENTRY,
Attorney General of
The State of Arkansas,
Little Rock, Arkansas;

E. J. BALL,
Special Assistant to
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Fayetteville, Arkansas.

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STATE OF TEXAS AND JOHN BEN SHEPPERD, ATTORNEY GENERAL OF TEXAS,

Defendants

MEMORANDUM BY THE STATE OF ARKANSAS

This Memorandum is filed in further response to certain questions raised by members of the Court during the oral argument of this case on October 21, 1953.

1. Several questions were asked concerning the status of the University of Arkansas.

The University has been a State instrumentality since the University was founded in 1871. Arkansas Stats. (1947), § 80-2301 *et seq.* All of the property used by the University is owned by the State of Arkansas. Arkansas Stats. (1947), § 80-2849-57; 80-2905; 80-3311. The Arkansas statutes, as well as the decisions of the Arkansas Supreme Court, have made it clear that the University is a State agency and instrumentality. *Jacobs* v. *Sharp*, 211 Ark.

865, 202 S.W. 2d 964 (1947) (The Board of Trustees of the University of Arkansas ". . . as a public agency of the State of Arkansas . . ." is authorized to construct buildings, etc.); *Vincenheller* v. *Reagan*, 69 Ark. 460, 474, 64 S.W. 278 (1901) ("The Arkansas Industrial University [now University of Arkansas] is an institution of the state, and we have already seen, subject to its control and government, through its own agents and appointees,—is an instrument of the state in the performance of a governmental work; . . ."). See also *Lindsay* v. *White*, 212 Ark. 541, 206 S.W. 2d 762 (1947); *Hudson* v. *Higgins*, 175 Ark. 585 (1927); *State* v. *Sloan*, 66 Ark. 575, 53 S.W. 47 (1898). Claims against the University of Arkansas, like claims against other units of the Government of the State of Arkansas, are processed not in the courts but before the State of Arkansas Claims Commission.

2. Several questions also were asked as to whether, because a question of Texas law might be involved in the case, this Court on discretionary grounds should decline to exercise or should defer exercising its jurisdiction over the controversy.

It is submitted that the existence of a question of state law furnishes no ground for denying the State of Arkansas access to this Court for a judicial determination of the controversy. This is a controversy between two sovereign States—the State of Arkansas and the State of Texas. The Judicial Code, enacted by the Congress pursuant to the provisions of the Constitution, confers on this Court "original and exclusive jurisdiction" of "all controversies between two or more states". 28 U.S.C. § 1251(a)(1). This is a jurisdiction which this Court does not share with any inferior federal court, nor with any state court. The policy

of the Congress is made unmistakably clear by the Reviser's Note to 28 U.S.C. § 1251, which states in part that:

> "The intent of said section 371 (7), (8) [of the previous Judicial Code] that the jurisdiction of the courts of the United States should be exclusive of the courts of the States in controversies to which a State is a party, and suits against ambassadors, public ministers, consuls and vice consuls, is preserved and clarified by this section and section 1351 of this title."

It appears, therefore, that it is this Court—and this Court alone—upon which the Congress has conferred the authority and the duty to adjudicate a controversy such as the present one.

The Court's authority and duty to adjudicate, we respectfully submit, is no less because the controversy may involve a question of state law.

The Court recently has had before it a somewhat comparable contention in connection with the diversity of citizenship jurisdiction of the federal district courts. This was in *Williams* v. *Green Bay & W. R. Co.*, 326 U.S. 549 (1946), where the Court decided (at pages 553-54):

> "Under the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, a federal court in a diversity case applies local law. In conflict of laws cases that may mean ascertaining and applying the law of a State other than that in which the federal court is located. *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487. The fact that the corporation law of another State is involved does not set the case apart for special treatment. The problem of ascertaining the state law may often be difficult. But that is not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it. As we said in *Meredith* v. *Winter Haven*, 320 U. S. 228, 234, 'The diversity jurisdiction

> was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts.' So long as diversity jurisdiction remains, the parties may not be remitted to a state court merely because of the difficulty of making a decision in the federal court. *Meredith v. Winter Haven, supra.*"

In diversity cases the jurisdiction of the federal courts is merely concurrent with that of the state courts. The considerations relied on in the *Williams* case apply all the more forcefully in situations where, like the case at bar, the jurisdiction of the federal court is exclusive rather than concurrent.

If this Court should decline to exercise its jurisdiction in the present case, the State of Arkansas would be deprived of a judicial remedy, unless it were prepared to appear in the state court in Texas and submit to the jurisdiction of that court. This is exactly what the Constitution and the Judicial Code are intended to protect a sovereign State against being compelled to do when it becomes engaged in a controversy with a sister State. As this Court said in *Kentucky v. Indiana*, 281 U. S. 163 (1930) at page 176:

> "Where the states themselves are before this court for the determination of a controversy between them, neither can determine their rights inter sese and this court must pass upon every question essential to such a determination, although local legislation and questions of state authorization may be involved".

Proper adherence to the policy established by the Congress should therefore require that this Court assume jurisdiction over the present controversy. The considerations un-

derlying *Massachusetts* v. *Missouri*, 308 U. S. 1, 17-20 (1939) are inapplicable for the reason that—as set forth in our Reply (pp. 9-10)—the present controversy is an action within the exclusive jurisdiction of this Court.

Respectfully submitted,

Tom Gentry,
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Little Rock, Arkansas.
E. J. Ball,
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October 22, 1953.